Supreme Court, U.S.
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No. 94 770

In the
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

Cletus Anderson,

Petitioner,

v.

Barry J. Nidorf, Chief Probation Officer;
Attorney General of the State of California,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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5PP

QUESTIONS PRESENTED

1) May the state, consistent with First Amendment guarantees of freedom of speech and the case law requirements of *Talley v. California* (1960) 362 U.S. 60, outlaw anonymous speech in the commercial marketplace by requiring the true name and address of the manufacturer and the name of the actual author[1] on all sound recordings as a prerequisite to offering them for sale? (California Penal Code section 653w.)

2) The legislative intent of the same statute is twofold: to protect the entertainment industry from losses caused by piracy and to protect the consumer by giving him an address to which to return a defective product.

Since piracy is not at all addressed by the statute, and consumer protection could be accomplished by a much narrower identification requirement which would not impinge on protected speech, is the statute unconstitutionally overbroad?

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[1] "...the actual author, artist, performer, producer, programmer, or group."

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No. _____

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CLETUS ANDERSON,
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v.

BARRY J. NIDORF, CHIEF PROBATION OFFICER; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Cletus Anderson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, affirming his judgment of conviction.

OPINIONS BELOW

The amended opinion of the Ninth Circuit Court of Appeals (App. A, *infra*) is reported at 26 F.3d 100. The order denying petition for rehearing in the Ninth Circuit is unreported (App. B, *infra*). The opinion of the District Court (App. C, *infra*) is unreported.

The California Supreme Court's order affirming the lower court's judgment is unreported. (App. D, *infra*.) The opinion of the California Court of Appeal, Second Appellate District (App. E., *infra*) is reported at 235 Cal.App.3d 586.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on June 7, 1994, and amended its decision on July 6, 1994 (App. A, *infra*), and denied petitioner's petition for rehearing on July 11, 1994 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, Section 2:

"This constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment I:

"Congress shall make no law...abridging the freedom of speech, or of the press;..."

California Penal Code, section 653w:

"(a) A person is guilty of failure to disclose the origin of a recording or audiovisual work when, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the outside cover box of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group.

(b) Any person who has been convicted of a violation of subdivision (a) shall be punished as follows:

(1) If the offense involves the ... offering for sale ... of at least 1,000 articles of an audio recording ... shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for two, tree, or five years, or by a fine not to exceed twenty-five thousand dollars ($25,000), or by both."

STATEMENT

On May 20, 1990, Deputy Higgins, a Los Angeles County Sheriff, was at a Lancaster, California, flea market. There he observed petitioner selling audio tapes and he saw several thousand displayed for sale that appeared to him to be pirated[2]. He returned to the police station and called Mr. Munsen, a consultant with the Record Industry Association of America, who opined that the tapes were counterfeit. The Sheriff returned to the flea market and arrested petitioner. Thereafter, petitioner was charged with a violation of California Penal Code section 653w [hereafter: Section 653w], a felony.

In the trial court, petitioner demurred to the complaint/information arguing that Section 653w violated the First Amendment to the United States Constitution and that it was overbroad. Petitioner's evidence at that hearing included an old Decca recording of Bing Crosby, a Berlitz language tape "Manufactured in Switzerland" and recently purchased at B. Dalton's Bookseller in Long Beach, a classical Beethoven recording "made in the E.E.C." and recently purchased at Dodd's Bookstore in Long Beach, a recording of a Spanish singer distributed by CBS and recently purchased at a Long Beach Mall, six cassette tapes recently purchased at the local Lancaster WHEREHOUSE, a German classical compact disc recently purchased at the local Lancaster MUSIC+PLUS, a children's tape and a self-help tape recently purchased at the Long Beach City College Bookstore, a book on tape from Random House, an Italian language instruction tape, and three different video cassette tapes. The Beatles White Album was also accepted into evidence at the preliminary hearing and additional items were presented at trial. Each of these items was shown to violate Section 653w. The trial court found the speech involved to be commercial speech and denied petitioner's issues.

Shortly thereafter in November of 1990 in the Los Angeles Superior Court petitioner was tried in a non-jury trial. Again he

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[2] Piracy is the unauthorized duplication of original commercial products. Bootlegging is the unauthorized recording of a performance.

argued that Section 653w violated the First Amendment of the United States Constitution and that it was overbroad. At the trial of the cause and over a relevancy objection[3], Mr. Munsen again opined that petitioner's tapes were pirated. He also testified that there were literally millions of sound recordings in the marketplace that did not bear the true name of the artist and, further, that when record companies had a hit - an item they could sell faster than they could manufacture it - the manufacturing process would be sub-contracted out. However, the sub-contractors actually doing the manufacturing would not be identified on these recordings. Again these issues were rejected and petitioner was then convicted of a violation of Section 653w.[4]

This conviction was appealed to the California Court of Appeal and was affirmed. It was assumed in the appellate opinion that Mr. Munsen was an expert and that the recordings were pirated, a charge never raised against petitioner. The Court of Appeal then decided that Section 653w was "narrowly and specifically drawn" to meet its statutory objective of protecting the public in general, and the entertainment industry in particular, from the losses caused by "piracy and bootlegging". Further, the court found the speech involved to be commercial speech and that therefore petitioner did not have standing to raise the overbreadth issue.

Interestingly, this court, like the others to follow, believed and explicitly stated in its opinion that petitioner was selling pirated tapes. Thus, when the court stated "one to whom a statute may constitutionally be applied cannot challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court", it was assuming petitioner was convicted of record piracy - a crime neither charged nor proven.

The California Supreme Court thereafter denied review.

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[3] The fact of being pirated does not go to any of the elements of the crime.

[4] The Court should note that at the lower level courts petitioner argued that Section 653w was preempted by federal copyright law. Petitioner now abandons this issue and will not argue it.

Petitioner petitioned for a writ of Habeas Corpus to the Federal District Court under 28 U.S.C. 2254, subdivision (a), presenting federal questions. The petition was denied. The opinion of the District Court stated that Anderson's overbreadth challenge was insufficient in that the overbreadth was not 'substantial' in relation to the statute's plainly legitimate sweep. Further, the District Court decided that it need not address the First Amendment facial invalidity issue because Anderson had failed to meet his burden of showing that Section 653w inhibited the constitutionally protected speech of third parties. "In other words, Anderson having failed to sustain his challenge on overbreadth grounds, Anderson's facial challenge must fail."

Petitioner then appealed the order denying writ of Habeas Corpus to the Ninth Circuit Court of Appeals, where jurisdiction was granted pursuant to 28 U.S.C. 1291.

The Ninth Circuit affirmed. That court in its original opinion stated its assumption that petitioner had been selling pirated tapes. Petitioner then applied for a rehearing pointing out that by making such an assumption the Ninth Circuit Court of Appeals had denied petitioner due process. Petitioner argued that the Ninth Circuit Court of Appeals had based its decision on a fact not in evidence, a fact not an element of the crime charged and not relevant at time of trial. Petitioner was thereby denied due process as he was unable, without notice, to prepare a defense, nor was this issue briefed on appeal.

Thereafter, the Ninth Circuit Court of Appeals amended its opinion to delete its erroneous factual finding and reaffirmed its decision. However, without the essential factual foundation a number of the case citations relied upon by the Ninth Circuit Court of Appeals are now inapposite and misleading.

Essentially, the Ninth Circuit Court of Appeals decides that since Section 653w applies only to sales for "commercial advantage or private financial gain" it is sufficiently "narrow and tailored to the state's content-neutral interests that it may constitutionally be applied to Anderson's sales, for commercial gain." The court goes on to indicate that Section 653w is not a statute that can never be applied in a valid manner but it makes no mention of facts indicating the validity of its application as to petitioner. Indeed, it is the wrongfully assumed fact that the petitioner was convicted of

tape piracy which gave rise to this line of reasoning in the first place. Once the opinion was amended to delete this "fact" this portion of the opinion was rendered devoid of foundational support.

The petitioner urged the Ninth Circuit Court of Appeals to find Section 653w facially invalid because it outlawed anonymity in the commercial marketplace. However, the court decided that in such instances the speakers themselves usually desired disclosure. The court did not distinguish between artists and manufacturers but simply stated that in such a situation the probability that compelled disclosure would exert a dreaded chilling effect was close to zero. And when they desired disclosure the application of Section 653w was certainly not unconstitutional.

Finally, the Ninth Circuit Court of Appeals found that although petitioner had demonstrated some overbreadth of Section 653w it was not substantial in comparison to its plainly legitimate sweep.

REASONS FOR GRANTING THE PETITION

Chief Justice Warren noted in *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967), that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

I

California Penal Code § 653w violates the First Amendment by impermissibly banning anonymous speech in sound recordings possessed for sale, seriously impairing freedom of expression

The First Amendment to the Constitution, made applicable to the several States through the Fourteenth Amendment, provides that: "Congress shall make no law. . . abridging the freedom of speech, or of the press;..."

Thus, if California Penal Code section 653w [hereafter: Section 653w] abridges the freedom of speech or the press it is facially void and invalid as violative of the United States Constitution.

Section 653w, as it read in 1990, required that a sound recording possessed for commercial purposes have clearly and conspicuously displayed thereon the true name and address of the manufacturer and the name of the actual author, artist, performer, producer, or group. Obviously this effects First Amendment rights.

The proper guidelines for analysis of a statute to determine if it meets the precision of regulation standard required of a statute impinging on First Amendment rights were set forth by this Court in *Talley v. California*, (1960) 362 U.S. 60, 64, 80 S.Ct. 536, 4 L.Ed.2d 559. *Talley* involved a facial challenge to an ordinance that barred all anonymous handbills in order to prevent false advertising and libel. The Court felt that such disclosure requirements might seriously impair First Amendment freedoms of expression and association. It therefore held that for such a statute to pass constitutional muster it must satisfy a two-pronged test. First, the statute must be based on a legislative history that defines its intended reach. Second, the statute must be drafted so as to limit

its reach to accomplish that purpose.

In this case the *Tally* analysis is as follows:

The Legislature expressed two intentions in drafting Section 653w:

1. To eliminate piracy of sound recordings; and,

2. To protect consumers by allowing them to have an address to which to return defective goods.

The statute must therefore be limited in its application to fulfill these legislative objectives with as little infringement on other First Amendment activities as possible.

As to the elimination of piracy the Ninth Circuit Court of Appeals agrees with petitioner that the inclusion of an intent to steal element in the statute would accomplish this end.

However, as to the consumer protection issue, the Ninth Circuit fails to analyze Section 653w from the standpoint of *Talley*. Rather, without rationale or explanation it simply states that the inclusion of an intent to steal element in Section 653w would "largely defeat" the consumer protection interest of the statute.

The Ninth Circuit should have submitted Section 653w to the required *Talley* analysis; *i.e.*, can Section 653w be written to achieve objectives of consumer protection without requiring the true name and address of the manufacturer and the true name of the artist?

Further, had it done so it would have found answer to this question is - yes, and very easily. The statute could be written to require that every seller provide a return address for defective products. Indeed, the statute could even require a return address for defectives that was within the State of California. That would go much further in protecting consumers than a product that complies with Section 653w but gives a true manufacturer's address in Taiwan, Peru or New York. In that simple manner anonymity would be allowed and consumers would be protected. Also, precision of regulation would be accomplished and First Amendment freedoms would be unfettered.

However, as it is written, Section 653w is unlimited in its reach. It regulates all sound recordings: videotapes, books-on-tape, cassette tapes, laser discs, phonograph records, digital tapes, compact discs, and whatever new sound technology that may appear in the future. Section 653w's elimination of anonymity

seriously impairs technological speech and, simultaneously, creates vast opportunities for prosecution. It is obvious that the requirement of identification affects content, and in that context Section 653w impinges on freedom of speech. "The First Amendment right to remain anonymous recognized in *Talley* clearly encompasses all forms of expression whether they be writings, or as in the instant case, a recorded message published over the telephone."[5] (*Huntley v. Public Utilities Commission* (1968) 69 Cal.2d 67, 74, 69 Cal.Rptr 605, 442 P.2d 685.)

Section 653w bars the possession for sale of all sound recordings at all times and in all places unless they contain the true name and address of the manufacturer, and the name of the actual author, artist, performer, producer, programmer or group. All who would communicate their thoughts through the medium of sound recording must first identify themselves. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (*Talley v. California*, (*supra*), 362 U.S. at p. 64.)

As this statute violates First Amendment guarantees of freedom of speech, as well as case law upholding the right of anonymity in all forms of expression, (*Talley v. California, Huntley v. Public Utilities Comm'n, supra*), Section 653w is in conflict with the First Amendment and void on its face.

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[5] Sound recordings qualify as "writings" within the meaning of the Constitution. (*Goldstein v. California*, 412 U.S. 546, 568, 93 S.Ct. 2303, 37 L.Ed.2d. 163 (1973).)

II.

California Penal Code section 653w is over-broad in that it: 1) outlaws constitutionally protected conduct for <u>all</u> who offer sound recordings for sale, not just those whom the legislators intended to target, and 2) could protect the consumer without infringing on First Amendment rights

The overbreadth doctrine provides that a statute may be struck down as "invalid on its face" without regard to whether the particular defendant's conduct is constitutionally protected. (*Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).)

Section 653w forbids anonymity or use of a pseudonym in **all** who possess sound recordings for sale. It places no conditions whatsoever on the status of ownership of the sounds, and misappropriation is irrelevant to a Section 653w prosecution. There is **no constitutionally protected conduct** vis-à-vis selling or possessing for sale anonymous sound recordings.

The method for judging a statute under attack as facially overbroad is put forth most succinctly by Justice Goldberg as judging a statute not in terms of the result worked by its application in the particular case but as to whether it is too sweeping in its coverage; and if so - if it proscribes constitutionally protected, as well as unprivileged, activity - striking it down as "invalid on its face" without regard to whether the particular defendant's conduct is constitutionally protected. This case, *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (*supra*), deals with a Fifth Amendment right to travel but the analysis is in accord with First Amendment principles per Justice Goldberg.

Another example of this principle of overbreadth or its counterpart, "void for vagueness" is found in *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1975). Defendant was convicted of violation of a 70-year-old statute making it criminal to treat the United States flag contemptuously where he had sewn it to the seat of his pants. The Court, per Justice Powell, held the statutory language "void for vagueness": "Where [as here] a

statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [due process doctrine of vagueness] demands a greater degree of specificity than in other contexts. ...[Moreover, the statutory language] is sufficiently unbounded [to allow] policemen, prosecutors, and juries to pursue their personal predilections. Legislators may not so abdicate their responsibilities for setting the standards on the criminal law."[6] (*Id.* at pp. 573, 575.)

In the *Talley* analysis, *supra*, it was demonstrated that Section 653w was not limited to prevent specifically targeted evils. It simply bars all anonymous commercial recordings.

The legislature in proposing this statute urged that the law was aimed at providing a way to identify those responsible for piracy and to protect consumers. Yet the statute is in no manner so limited. Section 653w does not address an unauthorized reproduction of sounds and the fact of an address of a manufacturer on a box in no way guarantees that the product purchased can be returned to that address, since the only direct contractual relationship the consumer has is with the retailer - not the manufacturer.

Rather, Section 653w simply and without exception requires the actual true name and address of the manufacturer to be on the outside of the product. Just as the statute in *Talley*, Section 653w bans possession for commercial purposes of **all** sound recordings under **all** circumstances anywhere that do not have the actual true name and address of the manufacturer printed on them in the conspicuous way the statute requires. As such, Section 653w is not drafted with even a modicum of precision.

This poor draftsmanship can only withstand scrutiny if here is no encroachment on constitutionally guaranteed freedoms. However, in this case Section 653w totally eliminates anonymous and pseudonymous speech from the commercial marketplace of ideas. One need only consider the manufacturer who is approached

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[6] For a summary of the evidence submitted on this issue and the myriad of potential prosecutions under Section 653w see **Statement,** *supra*, at pages 4 and 5.

by Salman Rushdie's agent and is asked to make *The Satanic Verses* into a video to see the chilling effect Section 653w could have on speech. And how many other ideas will be hidden rather than placed into the marketplace with a true name and address of a manufacturer?

Further, the decision of the Ninth Circuit Court of Appeals cites *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 515, for the position that the overbreadth of Section 653w must be not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

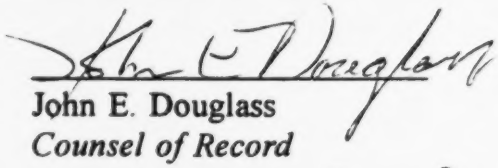
This determination is erroneous for two distinct reasons. First, the Ninth Circuit Court of Appeals failed to analyze Section 653w under the *Talley* criteria to determine if the statute's legitimate sweep is properly limited. Therefore, the Ninth Circuit Court of Appeals can not know if *Broadrick* has application, much less can it be said that *Broadrick* is determinative of the issues involved here.

And second, this finding is not supported by the evidence. Indeed, it can only be based on this court's lack of touch with marketplace reality or its inherent unwillingness to reverse a criminal conviction. Aside from the numerous individual examples of overbreadth in the record, the prosecution's own witness admitted that the items that are selling the fastest, the items that logically make up the greatest part of the sales to consumers, these are the very items most likely to be in violation of Section 653w because these are the items that are most likely to be sub-contracted out for manufacture. Thus, the overbreadth established by the evidence goes not to the marginal fringes of protected expression but rather, straight to its heart.

CONCLUSION

Thus, petitioner respectfully urges this Court to grant this petition for Writ of Certiorari to protect the First Amendment freedom of speech rights of all who would communicate through the medium of sound recording (and can't afford to give it away) in California and nationwide.

Respectfully submitted,



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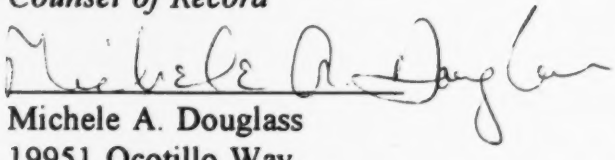

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APPENDIX A

CLETUS ROBERT ANDERSON, Petitioner-Appellant, v. BARRY J. NIDORF, Chief Probation Officer, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	)	No. 93-55131 D.C. No. CV-92-03515-AWT ORDER AND AMENDED OPINION

Appeal from the Unites States District Court
for the Central District of California
A.Wallace Tashima, District Judge, Presiding

Argued and Submitted
September 2, 1993 -- Pasadena, California

Filed June 7, 1994
Amended July 6, 1994

Before: Thomas Tang, William C. Canby, Jr., and
Robert R. Beezer, Circuit Judges.

Per Curiam

SUMMARY

**Criminal Law and Procedure/White Collar Crimes/
Defendants and Accused, Rights of**

The court of appeals affirmed a district court denial of a petition for writ of habeas corpus. The court held that federal

copyright laws do not preempt a California statute that criminalizes the failure to disclose the origin of a sound recording.

Appellant Cletus Anderson was unable to produce documentation demonstrating the origin or manufacturer of tapes that he was selling. He was arrested for failure to disclose the origin of a sound recording, in violation of California Penal Code § 653 w.

Anderson was convicted in state court. The California Court of Appeal affirmed his conviction. The California Supreme Court denied review. After the California Supreme Court denied Anderson's state petition for habeas corpus, he filed a petition for habeas corpus in the district court. The district court adopted a magistrate judge's recommendation denying the petition.

Anderson appealed, contending that § 653w is preempted by federal copyright laws because the statute was intended to protect the rights of copyright owners through the prevention of pirating. Anderson also contended that § 653w is facially invalid under the First Amendment because it compels the disclosure of speech by those wishing to remain anonymous for legitimate reasons. Finally, Anderson also contended that the statute is unconstitutionally overbroad.

[1] Although one of § 653w's purposes is to protect copyright owners from pirating, [2] the statute also has the purpose of protecting the public from false and deceptive commercial practices. Federal copyright laws do not serve this purpose of protecting consumers. [3] Because of § 653w does not prohibit the reproduction of copyrighted works, but rather prohibits selling recordings without disclosing the manufacturer and author of the recording, the federal copyright laws do not preempt the state statute.

[4] Section 653w is sufficiently narrow and tailored to the state's content-neutral interests that it could constitutionally be applied to Anderson's sales, for commercial gain.

[5] The probability that § 653w's disclosure requirement would exert a dreaded chilling effect on performers and manufacturers who wished to maintain their anonymity was close to zero. [6] Moreover, Anderson made no showing that the overbreadth of § 653w was substantial in comparison with the statute's legitimate sweep. Thus, Anderson's overbreadth challenge was rejected.

COUNSEL

John E. Douglass, Long Beach, California, for the petitioner-appellant.

Sanjay T. Kumar, Los Angeles, California, for the respondents-appellees.

ORDER

IT IS ORDERED that the opinion filed on June 7, 1994, is amended as follows:

(1)p. 6041 of the slip opinion, line 15: delete ", of pirated tapes";

(2)p. 6041, line 19: delete "and others selling pirated records, Anderson" and replace with ",he".

OPINION

PER CURIAM:

OVERVIEW

Cletus Robert Anderson appeals the district court's denial of his habeas corpus petition challenging his conviction under California Penal Code § 653w for failure to disclose the origin of a sound recording. Anderson claims that this California statute is preempted by federal copyright laws and violates the First Amendment. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

At a flea market in May of 1990, a Los Angeles County Deputy Sheriff approached Cletus Anderson, who was selling almost 5,000 tapes which appeared to be pirated.[1] When Anderson could not produce any documentation demonstrating the origin or manufacturer of the tapes, he was arrested for failure to disclose the origin of a sound recording, in violation of California Penal Code § 653w.[2]

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[1]"Piracy is the term used for unauthorized duplication of original commercial products." *See Piracy and Counterfeiting Amendments Act of 1982*, S. Rep. No. 97-274, 97th Cong. 1st Sess. 3, *reprinted in* 2 U.S. Code, Cong. & Admin. News 127, 129 (1982). This is to be distinguished from "bootlegging" which is the unauthorized recording of a performance.

[2]Section 653w(a) provides in relevant part:

A person is guilty of failure to disclose the origin of a recording or audiovisual work when, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufacturers, or possesses for these purposes, any recording or audiovisual work, the outside cover box or jacket of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group.

Anderson waived a jury trial and was convicted by the state court on November 20, 1990. He was sentenced to 180 days in county jail and five years probation. A California Court of Appeals affirmed Anderson's conviction on appeal, rejecting his arguments that the California statute was preempted by federal copyright laws and that his conviction violated the First Amendment. People v. Anderson, 286 Cal. Rptr. 734 (Cal. App. 1991). The California Supreme Court denied review on January 22, 1992. Anderson then filed a petition for habeas corpus in federal district court, but accepted a dismissal without prejudice in order to petition the California courts for post-conviction relief. After the California Supreme Court denied Anderson's state petition for habeas corpus on May 27, 1992, Anderson filed a second petition in federal district court. The court adopted the magistrate judge's Report and Recommendation denying Anderson's petition for habeas corpus.

DISCUSSION

A district court's decision on a petition for writ of habeas corpus is reviewed *de novo*. *Lincoln v. Sunn*, 807 F.2d 805, 808 (9th Cir. 1987).

I. *Is California Penal Code § 653w preempted by federal copyright laws?*

The federal copyright laws preempt state-created "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 301(a). We have held:

Section 301(a) preempts a state-created right if that right "may be abridged by an act which, in and of itself, would infringe one of the exclusive rights [listed in § 106]." But if violation of the state right is "predicated upon an act incorporating elements beyond mere reproduction or the like," there is no preemption.

Oddo v. Ries, 743 F.2d 630, 635 (9th Cir. 1984) citations

omitted). *See also G. S. Rasmussen & Assoc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896, 904 (9th Cir. 1992) (following *Oddo*), *cert. denied*, 113 S. Ct. 2927 (1993).

[1] Anderson argues that § 653w is preempted by copyright laws because § 653 w is intended to protect the rights of copyright owners through the prevention of pirating. It is clear that this is one of the purposes of the statute. The California Court of Appeals explained:

> Penal Code section 653w was enacted as a part of a comprehensive statutory scheme designed to prevent and punish the misappropriation of recorded music for commercial advantage or private financial gain. (Pen. Code, § 653h.)
>
> ....
>
> The state's interest in enacting Penal Code section 653w is the desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of the "piracy and bootlegging" of the industry's products.

Anderson, 298 Cal. Rptr. at 735, 737.

[2] However, the statute also has the purpose of "protecting the public from being victimized by false and deceptive commercial practices." *Id.* at 737. This point was made by the district court:

> [Anderson's] argument ignores the other purpose the legislative materials ... show Section 653w was designed to serve: '*assist[ing] consumers in this state by mandating that manufacturers market product[s] for which consumers can go back to the source if there are any problems or complaints.*' Preemption would frustrate the State's objective of consumer protection through disclosure.

[ER 18 n.4. (emphasis in original; internal citations omitted).] Federal copyright laws do not serve this purpose of protecting consumers. They are designed to protect the property rights of copyright owners. *See, e.g., Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 603 (1834).

Further,the California statute criminalizes selling recordings whose labels fail to disclose the manufacturer or author, it does not criminalize "bootlegging" of copyrighted works. An act criminalized by § 6532 does not "in and of itself ... infringe one of the exclusive rights" listed in the copyright laws. *Oddo*, 743 F.2d at 635. The state incorporated "elements beyond mere reproduction or the like," *id.*, failing to appropriately label recordings for sale.

[3] Because § 653w does not prohibit the reproduction of copyrighted works, but rather prohibits selling recordings without disclosing the manufacturer and author of the recording (regardless of its copyright status), the federal copyright laws do not preempt the state statute.

II. *Does California Penal Code § 653w violate the First Amendment?*

Anderson makes two arguments attacking the constitutionality of § 653w: first, that the statute is facially invalid under the First Amendment[3] because it compels the disclosure of the identity of the speaker, and second, that it is unconstitutionally overbroad.[4] Although these two lines of attack overlap, and do so particularly in this case, the Supreme Court

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[3]The Fourteenth Amendment has been construed to make the First Amendment applicable to state action. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1508 n.1 (1993).

[4]Anderson also argues that the statute is void for vagueness, but these arguments actually go to the overbreadth of the statute.

has sometimes distinguished between the two. In claiming that a statute is unconstitutional on its face, the litigant assets his own rights but also seeks to demonstrate that the statute is so suppressive of speech that it could never be validly applied. *See City Council v. Taxpayer for Vincent*, 466 U.S. 789, 796-798 (1984). In an overbreadth challenge, the litigant contends that, even though a more narrowly drawn statute could validly prohibit his or her own conduct, the statute in issue is invalid because it is so broadly written that it infringes unacceptably on the first amendment rights of third parties. *Id.* at 798-99.

A.

Anderson first argues that the statute is facially invalid under the First Amendment because it compels the disclosure of speech by those wishing to remain anonymous for legitimate reasons. However, Anderson does not claim that he has a legitimate reason for failing to disclose the origin of the tapes and does not contend that his own speech rights were inhibited by the statute's disclosure requirement. His arguments relate wholly to the infringement of rights of others, which we will discuss in connection with his overbreadth challenge.

Anderson bases his case on *Tally v. California*, 362 U.S. 60 (1960), in which the Supreme Court sustained a facial challenge to an ordinance that banned all anonymous handbills purportedly in order to prevent false advertising and libel. Citing the important reasons for protecting anonymous political discourse, the Court held that the restriction impermissibly impaired freedom of expression. *Id.* 64-65. The Court rejected the argument that the ordinance was justified by its purpose of identifying those responsible for fraud, false advertising and libel because the ordinance's effect was not so limited, nor had the Court been referred to legislative history indicating such a purpose. *Id.* at 64.

There are several distinctions between *Talley* and the present case. Here, there is legislative history indicating that §

653w was enacted both to protect consumers and to prevent tape and record piracy. While tapes and records are doubtless speech, as Anderson contends, they are also products. Section 653w protects consumers by providing them with a name and address to which to complain if the product is defective. Disclosure of the manufacturer also protects against piracy. Anderson contends that this latter interest of the state easily could be served by narrowing the statute to criminalize only anonymous sales "without the consent of the owner" of the sound or video message. But such a limitation, which might adequately serve the state's anti-piracy interest, would largely defeat its consumer-protection interest.

In addition, § 653w is limited to sales and possession for sale of recordings or audiovisual works, and such conduct must be "for commercial advantage or private financial gain." §653w. This limitation appears to be designed to except not only free distribution of anonymous materials, but sale under certain conditions, as when one urging a point of view sells the record or tape to cover its cost. *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (religious tracts protected even if sold; "It should be remembered that the pamphlets of Tom Paine were not distributed free of charge"). At least, § 653w is capable of such a narrowing construction.

[4] We are satisfied, therefore, that § 6532 is sufficiently narrow and tailored to the state's content-neutral interests that it may constitutionally be applied to Anderson's sales, for commercial gain. The statute is not one of that can "never be applied in a valid manner." *Taxpayers for Vincent*, 466 U.S. at 798.

B.

Even though the statute may be validly applied to Anderson, he argues that the statute is nonetheless so overbroad it "may inhibit the constitutionally protected speech of third parties." *New York State Club Ass'n. Inc. v. City of New York*,

487 U.S. 1, 11 (1988).[5] A statute will be declared unconstitutional only if the court finds "a 'realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *Id.* (quoting Taxpayers for Vincent, 466 U.S. at 801). The overbreadth must be not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[5] Anderson asserts that performers and manufacturers have the right to maintain their anonymity, a peculiar argument considering that most of their lives are consumed in marketing their identity. The primary purpose of § 653w is to prevent the piracy of the works of these performers and manufacturers; the probability that its disclosure requirement will exert a dreaded chilling effect on these performers and manufacturers is close to zero. Certainly the application of § 653w is constitutional in these many instances when the speakers themselves desire to disclosure. On this ground alone, Anderson's claim of substantial overbreadth founders.

[6] Anderson cites examples of legitimate, non-pirated sound recordings which would be subject to prosecution under § 653w for failure to include the manufacturer on the label, including some old, out-of-state and foreign recordings, and those in which a record company contracts out the manufacturer to another firm but does not place that name on the recording. Anderson also raises again the possibility that some protected political or anti-establishment recordings will be chilled by the statute (although, as we have said, they will be limited to those sold for commercial gain or private profit). These arguments do not, however, establish that the overbreadth of section 653 is

[5]"Properly understood, [this] challenge is an exception to ordinary standing requirements and is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power."*Id.*

substantial in comparison with its legitimate sweep. *See Broadrick*, 413 US. at 615. Certainly Anderson has made no showing to that effect. "Even where a statute at its margins infringes on protected expression," facial invalidation for overbreadth is inappropriate when the remainder covers a whole range of constitutionally proscribable conduct. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).[6] We accordingly reject Anderson's overbreadth challenge.[7]

CONCLUSION

The district court's denial of Anderson's petition for writ of habeas corpus is **AFFIRMED**.

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[6]Our rejection of the overbreadth challenge does not, of course, preclude a constitutional challenge to a future application of the statute to one whose speech is constitutionally protected. *See Shackelford v. Shiorley*, 948 F.2d 935, 941n.5 (5th Cir. 1991).

[7]Because the statute is not overbroad, we need not reach the parties' arguments whether the labelling of sound recordings is commercial or noncommercial speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (overbreadth doctrine does not apply to commercial speech).

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLETUS ROBERT ANDERSON, Petitioner-Appellant, v. BARRY J. NIDORF, Chief Probation Officer; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	) No. 95-55131)) CV-92-03515-AWT)) ORDER

BEFORE: TANG, CANBY, AND BEEZER, Circuit Judges.

With the amendment to the opinion, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLETUS ROBERT ANDERSON, Petitioner,	) NO.CV. 92-3515-AWT(JR)
v.	) JUDGMENT
BARRY J. NIDORF, Chief Probation Officer, Respondent.	)

IT IS ADJUDGED that the petition is dismissed on the merits.

DATED: September 23, 19920

A. WALLACE TASHIMA
A. WALLACE TASHIMA
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLETUS ROBERT ANDERSON Petitioner, v. BARRY J. NIDORF, Chief Probation Officer, Respondent.	) NO. CV-92-3515-AWT(JR))) ORDER) ADOPTING FINDINGS,) CONCLUSIONS AND) RECOMMENDATIONS) OF UNITED STATES) MAGISTRATE JUDGE

Pursuant to 28 U.S.C. §636 (b)(1)(B), the Court has reviewed the pleadings and all papers herein, the Report and Recommendation, and adopts the findings, conclusions and recommendations of the United States Magistrate Judge, after having made a *de novo* review of those portions objected to.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Final Report and Recommendation, and the Judgment by United States mail on the petitioner and respondent.

DATED: September 23, 1992

A.WALLACE TASHIMA
A. WALLACE TASHIMA
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLETUS ROBERT ANDERSON,) Petitioner,	) NO.CV 92-3515-AWT(JR)
v.	) FINAL REPORT AND RECOMMENDATION
BARRY J. NIDORF, Chief, Probation Officer,) Respondent.	)

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. §636 (b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On September 3, 1992, the Clerk filed a Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate Judge's Report and Recommendation.

Objections were filed on September 21, 1992.

IT IS THEREFORE RECOMMENDED that this Court issue an Order approving and adopting the Report and Recommendation and directing that Judgment be entered dismissing the petition.

DATED: September 22, 1992.

JOSEPH REICHMANN
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLETUS ROBERT ANDERSON, Petitioner,	) NO.CV-92-3515-AWT(JR)) REPORT AND) RECOMMENDATION) OF UNITED
v.	) STATES MAGISTRATE) JUDGE ON STATE
BARRY J. NIDORF, Chief Probation Officer, Respondent.	) PRISONER'S PETITION) FOR WRIT OF HABEAS) CORPUS) 18 U.S.C. §2254

The Magistrate Judge to whom this matter is assigned submits this Report and Recommendation to the Honorable A. Wallace Tashima, United States District Judge, pursuant to 28 U.S.C. § 636 (b)(1)(B) and General Order 194 for the Central District of California.

BACKGROUND

Viewing the essentially undisputed facts most favorably to the prosecution, *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S.Ct. 2781, 2793, *reh.denied*, 444 U.S. 890, 100 S.Ct. 195 (1979), the record discloses the following:

On May 20, 1990, at approximately 9:00 a.m., Los Angeles Country Deputy Sheriff William Higgins, while at the Lancaster, California Flea Market, saw Petitioner Cletus Robert Anderson ("Anderson") and another man selling tapes at a display booth. Deputy Higgins, posing as a customer, approached the booth and saw several thousand tapes displayed for sale and a type of stereo system for demonstrating them. [R.T. 71-73.] Deputy Higgins examined the tapes, which appeared to be counterfeit or pirated, returned to the Sheriff's station, and called Kenneth Munson, a security consultant retained by the Recording Industry Association of America. [R.T. 33, 75, 81.] Higgins described the tapes, the price the tapes were selling for and the operation, and Mr. Munson advised

Deputy Higgins the tapes were counterfeit. [R.T. 76.] About an hour after leaving the swap meet, Deputy Higgins returned. Anderson was loading the tapes into a van, and his business partner had already left. Deputy Higgins asked Anderson, among other things, whether Anderson had any documentation showing the origin or manufacturer of the tapes he was selling. Anderson said he did not. [R.T. 73-74.] Deputy Higgins then seized 4,940 audio tapes that Anderson and his partner were selling [R.T. 78] and arrested Anderson.

At trial Mr. Munson testified that he reviewed the tapes seized by the Los Angeles County Sheriff's Department and determined that they were "pirate recordings." [R.T. 41-42][1] Mr. Munson testified that, out of the approximately 107 different album titles he segregated out of the tapes seized by the Sheriff's Department, "there were eleven that contained the name and address of a manufacturer or pretended manufacturer, and the remaining number had no name or address of any manufacturer at all." [R.T. 42-43].

After a preliminary hearing on June 26, 1990 [C.T. 26], on July 10, 1990, the Los Angeles County District Attorney charged Anderson by information with one count of failure to disclose the origin of a recording, in violation of Cal. Penal Code §

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[1] Mr. Munson testified that a "pirated tape is a recording wherein the sounds on that tape appear legitimately on an existing record album of some kind . . . but on a pirate tape there is no effort to duplicate any graphics. The graphics that appear on the packaging are graphics that are made up by the individual that packages and sells or markets the product." [R.T. 35.] A "pirated" tape or record is different from a "counterfeit" or "bootleg" recording. [R.T. 34-36.] See generally Piracy and Counterfeiting Amendments Act of 1982, S. Rept. No. 97-274, 97th Cong. 1st Sess. 3, reprinted in 2 U.S. Code, Cong. & Admin. News 127, 129 (1982) ("Piracy is the term used for unauthorized duplication of original commercial products. In counterfeiting, the packaging and/or labelling of the original products are forged as well").

653w. [C.T. 28-29][2] Anderson demurred to the information on the ground that Cal. Penal Code § 653w violates the First Amendment to the United States Constitution. [A.C.T. 1-25.] The court overruled the demurrer. [C.T. 40; R. T. 15-16.] The parties waived a jury [C.T. 43; R.T. 21-22, 24-25], and the Court, after a two-day trial, convicted Anderson. [C.T. 44.] The Court sentenced Anderson to 5 years' probation, 180 days in county jail and 200 hours of community service. [C.T.45.]

Prior to sentencing, on November 26, 1990, Anderson filed a motion in arrest of judgment, in which he argued that federal copyright law preempts Cal. Penal Code § 653w. [A.C.T. 73-77.] The Court denied this motion. [R.T. 111-112.] Anderson's direct appeal was denied on October 23, 1991, in a published opinion. *People v. Anderson*, 235 Cal. App. 3d 586, 286 Cal. Rptr. 734 (1991). The State concedes that Anderson exhausted his state remedies before he filed the petition which is the subject of this Report and Recommendation. [St. Ret., p.4.]

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[2]California Penal Code § 643w reads, in pertinent part:

> "Failure to disclose origin of recording; Punishment.
>
> "A person is guilty of failure to disclose the origin of a recording when, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the sale or resale, or rents, or possesses for these purposes, any recording, the outside cover of which does not clearly and conspicuously disclose the actual and true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group ..."

DISCUSSION

Anderson makes three claims: Cal. Penal Code § 653w (Section 653w") violates the First Amendment to the United States Constitution [Pet., p.6], Section 653w is invalid under the First Amendment overbreadth doctrine [Pet., pp. 6-7], and federal copyright law preempts Section 653w. [Pet., p.7.]

A. Copyright Preemption

The Copyright Act, 17 U.S.C. §§ 1 et seq., does not preempt Section 6532, either expressly under 17 U.S.C. § 301(a) or by implication.

1. Express Preemption

Anderson argues that the express preemption provisions of the Copyright Act, 17 U.S.C § 301, preempt Section 653w. [Tr., pp. 21-23.] Under Section 301, "preemption exists only if: 1) the state right is 'within the subject matter of copyright ' as defined in the Act, and 2) the state right is 'equivalent' to any exclusive rights of a federal copyright." *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1238 (C.D. Cal. 1987), quoting 17 U.S.C. § 301(a).

> "'[A] right which is 'equivalent to copyright' is one which is infringed by the mere act of reproduction, performance, distribution or display ... If, under state law the act of reproduction, performance, distribution or display ... will in itself infringe the state created right, then such right is preempted. But if other elements are required, in addition or instead of, the acts or reproduction, performance, distribution or display in order to constitute a state created cause of action, then the right does not lie "within the scope of copyright," and there is no preemption.'"

Motown, 657 F. Supp. at 1239, quoting 1 M. Nimmer, The Law of Copyright § 1.01 [B][3] at 1-11 to 1-12 (1984). See also Oddo v. Ries, 743 F.2d 630, 635 (9th Cir. 1984) ("Section 301 (a) preempts a state-created right if that right 'may be abridged by an act which, in and of itself, would infringe one of the rights [listed in § 106 of the Copyright Act]"; "But if the violation of

the state right is 'predicated upon an act incorporating elements beyond mere reproduction or the like' [cite], there is no preemption"); *Boeing Co. v. Sierracin Corp.*., 108 Wash.2d 38, 738 P.2d 665, 674 (Wash. 1987) (Copyright Act does not preempt State trade secrets law, which "extends protection beyond copyright" to protect ideas as well as their expression). However, "simply because certain state claims contained different elements from their copyright counterparts, this alone would not save them from preemption. Instead ... the "extra element"' ... must be one which changes the nature of the action so it is qualitatively different from a copyright infringement claim.' *Motown*, 657 F. Supp. 1523, 1535 (S.D.N.Y. 1985) (emphasis in original). Furthermore, "[e]lements such as awareness or intent may alter the scope of the action but not its nature." *Motown*, 657 F. Supp. at 1240. Where the "essence" of a claim "is derived from defendants unauthorized use of a copyrighted work" the claim is preempted. Id.

Under this test, Section 301 of the Copyright Act does not preempt Section 653w. Section 653w prohibits "failure to disclose the origin" of a sound recording, which it defines as the advertising, sale or distribution of "any recording, the outside cover of which does not clearly and conspicuously disclose the actual and true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group ..." Cal. Pen. Code § 653w(a) (emphasis added). As the Attorney General's analysis of the bill which included Section 653w states, "section 653w requires no more than truth in labelling." [Atty. Gen. Analysis of A.B. 3619 (June 14, 1984), p. 3, A.C.T. 49.] The "extra element," *Motown*, 657 F. Supp. at 1239 (internal cites omitted), of a Section 653w violation which is not present in copyright is the failure to label. *Cf. Wolfe v. United Artists Corp.*, 583 F. Supp. 52, 56 (E.D. Pa. 1983) ("The case law that has succeeded the Copyright Act has been very specific stating that ... failure to give plaintiff proper authorship credit in the Works ...' [is] not [a] Copyright Act claim[]"). The "nature" or "essence" of Section 653w is failure to affix the name of the manufacturer or author, not "unauthorized use of a copyrighted work." 657 F. Supp. at

1240. Section 653w is therefore not "equivalent to copyright," *Motown*, 657 F. Supp. at 1239 (internal cites and quotes omitted), and not preempted under Section 301 of the Copyright Act.

2. Implied Preemption

Although not expressly preempted, Section 653w is still preempted if it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 470, 94 S.Ct. 1879, 1885 (1974), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67, 62 S.Ct. 399, 404 (1941) (patent act case), in passing the Copyright Act. *Goldstein v. California*, 412 U.S. 546, 570, 93 S.Ct. 2303, 2316 *reh denied*, 414 U.S. 883, 94 S.Ct. 27 (1973) (finding no preemption of California anti-piracy laws where "[n]o ... conflict between state law and federal law arises ...")[3], 1 M. Nimmer, The Law of Copyright § 1.01[B][3], at 1-44.3 (1192). There is no evidence in this record that Section 653w conflicts with or interferes in any way with the Copyright Act.

Anderson contends that federal Copyright laws "make proper provision for anonymous and pseudonymous commercial recordings" and that Section 653w does not.m [Pet., p.7; see also A.C.T. 76-77.] Anderson has not, however, shown how the State disclosure requirement conflicts with any rights protected by the Copyright Act. Sections 101 and 409 of the Copyright Act, cited by Anderson [Tr., p. 23], merely provide procedures to apply for copyright protection on anonymous and pseudonymous works. See 17 U.S.C. §§ 101 (defining anonymous and pseudonymous works), 409(2), (3) (procedures to apply for copyrights on anonymous and pseudonymous works). They do not prohibit compelled disclosure. Further, here the State did not prosecute Anderson for authoring or selling an anonymous or pseudonymous work but for knowingly possessing for sale and

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[3] In *Crow v. Wainwright*, 720 F.2d 1224, 125 (11th Cir. 1983), *cert. denied*, 469 U.S. 819, 105 S.Ct. 89 (1984), the court noted that 17 U.S.C. § 301 was amended after *Goldstein* in order to overrule that case as to works "fixed" after February 15, 1972.

selling sound recordings whose authors are known but which do not properly identify the manufacturer. Thus, Anderson's argument, even if valid for some cases, does not help him here. Federal Copyright law does not preempt Section 653w as applied to Anderson.[4]

B. First Amendment Arguments

Anderson challenges Section 653w as facially void [Pet., p. 6; Tr., pp. 4-10] and under the overbreadth doctrine. [Pet., p. 7; Tr., pp. 11-20][5] To prevail on these claims, Anderson "must

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[4] In his Traverse, Anderson argues that Section 653w is preempted because its purpose is "to protect the rights of the copyright owners of the various sound recordings which are pirated." The "very fact that it is considered part of an 'anti-piracy' scheme of legislation," the argument goes, "makes it clear what is being protected: ownership rights." [Tr., p. 23] This argument ignores the other purpose the legislative materials include in the record shown Section 653w was designed to serve: "assist[ing] consumers in this state by mandating that manufacturers market product for which consumers can go back to the source if there are any problems or complaints." [Testimony on A.B. 3619, Presented by Joel Schoenfeld, Recording Industry Association of America, to Assembly Criminal Law and Public Safety Committee, A.C.T. 44-45 (emphasis added; original emphasis deleted). See also A.C.T. 46, 49-50 (describing the purposes of Section 653w in similar terms).] Preemption would frustrate the State's objective of consumer protection through disclosure, which is, if anything, more needed here than in other cases since Anderson's tapes were pirated. As the Supreme Court stated when discussing the preemptive scope of patent law in *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232. 84 S.Ct. 784, 789, *reh. denied*, 376 U.S. 973, 84 S.Ct. 1131 (1964): "Doubtless a state may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source ..."

[5] This Report and Recommendation assumes that this case involves speech of a type entitled to the highest level of first amendment protection and not mere "commercial speech" as found by the California Court of Appeal. *See People v. Anderson*, 235 Cal. App. 3d

demonstrate that the challenged law either 'could never be applied in a manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Assn. v. City of New York*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233 (1987), *quoting City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.Ct. 2118, 2125 (1984). This Report and Recommendation need only consider Anderson's overbreadth claim. Since Anderson has failed to meet his burden of showing that Section 653w "'... inhibit[s] the constitutionally protected speech of third parties.'", he has manifestly failed to show that the statute "'could never be applied in a valid manner.'" *Id.* In other words, Anderson having failed to sustain his challenge on overbreadth grounds, Anderson's facial challenge necessarily fails.

"The overbreadth doctrine constitutes an exception to the general rule requiring the constitutionality of a statute to be tested against the conduct of the party before the court. It permits a party to challenge a law, not on the ground that the statute is unconstitutional as enforced against it, but rather on the ground that the statute's application to third persons not before the court violates the First Amendment." *Adult Video Assn. v. Barr*, 960 F.2d 781, 787, (9th Cir. 1992). "In order to prevail, the plaintiff must demonstrate 'substantial' overbreadth, '"judged in relation to the statute's plainly legitimate sweep."'" *Id.*, *quoting City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799-800, 104 S.Ct. 2118, 2126 (1984) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918 (1973)0. Put another way, "[e]ven where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct ...'" *Osbourne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 1697 *reh. denied*, 496 U.S. 913, 110 S.Ct. 2605 (1990), *quoting New York v. Ferber*, 458 U.S. 747, 770n.25, 102 S.Ct. 3348, 3362n.25 (1982).

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at 591, 286 Cal. Rptr. at 737.

In addition, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to overbreadth challenge." *Vincent*, 466 U.S. at 800, 104 S.Ct. at 2126. A "'substantial overbreadth' determination requires that the party launching the facial attack 'demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally.'" *United States v. Johnson*, 952 F.2d 565, 577 (1st Cir. 1991), *cert. pet. filed*, 60 U.S.L.W. 3784 (1992), *quoting New York State Club Assn. v. City of New York*, 487 U.S. at 14, 108 S. Ct. at 2234.

Anderson argues that Section 653w is overly broad because, although it assertedly "is essentially a theft statute," it "does not address the question of fraud, false advertising or any *malum in se* act, but "requires identification of all, not just all who would defraud, but all who would speak." [Tr., p. 14.] This statute, the argument goes, "applies across the board to all commercial recordings ...," "puts many commercial businesses at risk" [Pet., p. 7] and prevents the advocates of controversial views from hiding the origins of those views. [Tr., p.6.]

However, the statute does not address itself to all efforts to distribute sound recordings. Rather, it applies "only to those who possess or distribute such material 'for commercial advantage or private financial gain.'" *People v. Anderson*, 235 Cal. App. 3d at 591, 286 Cal. Rptr. at 737. "A truly zealous and committed proselytizer may distribute his or her anonymous views, reproduced in any form, free of charge and free from the restrains imposed by this statute." Id. in addition, although, as the Court of Appeal found, the exhibits introduced at the hearing on Anderson's demurrer show that "many commercial recordings available at retail stores do not comply with the requirements of Section 653w," *People v. Anderson*, 235 Cal. App. 3d at 592, 286 Cal. Rptr. at 738, overbreadth analysis "focuses on the potential application of a statute to constitutionally protected conduct," *United States v. Wise*, 550 F.2d 1180, 1186 (9th Cir. 1977), *citing Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972), and "[t]he vending of copyrighted material even when done with proper authorization, is not

behavior subject to constitutional protection." *Wise*, 550 F.2d at 1186-87. Thus, Section 653w "'covers a whole range of easily identifiable and constitutionally proscribable ... conduct ..." *Osbourne*, 495 U.S. at 112, 110 S.Ct. at 1697, *quoting Ferber*, 458 U.S. at 770n.25, 102 S.Ct. at 3362n.25, including Anderson's sale and possession for sale here.

Anderson also argues that "[f]orcing manufacturers to put their name on the sound recordings they manufacture inhibits speech as it inhibits the manufacture of unpopular speech due to fear of reprisal" [Pet., p.6] and that the first amendment prohibits compelled disclosure of the name of the "manufacturer" and the "actual author, artist, performer or group" [Tr., p. 4] because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." [Tr., p.6.][6] However, although Anderson provides some examples of protected speech he claims the statute would proscribe [*e.g.*, Tr. 6], he neither provides any evidence of speech actually chilled by Section 653w nor provides examples or analysis which "suggests that a broad range of protected speech might impermissibly fall within the ambit of the ... statute." *Shackelford v. Shirley*, 948 F.2d 935, 940 (th Cir. 1991). Merely hypothesizing isolated examples is insufficient to meet Anderson's "burden" of "'demonstrat[ing] from the text of [the law] and from actual fact' that substantial overbreadth exists." *Massachusetts v. Oakes*, 491 U.S. 576, 589-90, 109 S.Ct. 2633, 2641 (1989) (Scalia, J., q*uoting New York State Club Assn. v. City of New York*, 487 U.S. at 14, 108 S.Ct. at 2234) (emphasis supplied by Scalia, J.). *See also Longo v. U.S. Postal Service*, 953 F.2d 790, 798 (2d Cir. 1992), *cert. pet. filed*, 60 U.S.L.W.

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[6] Although Anderson makes these arguments in connection with his contention that Section 653w is facially invalid, they pertain to and should be dealt with in connection with his overbreadth argument, since they allege that Section 653w "'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Assn.*, 487 U.S. at 11, 108 S.Ct. at 2233, *quoting City Council v. Taxpayers for Vincent*, 466 U.S. at 798, 104 S.Ct. at 2125.

3784 (1992) (overbreadth challenge rejected where "Longo does little more than suggest that there could be applications of [the challenged statute] that would prove unconstitutional"); *United States v. Johnson*, 952 F.2d at 577 (unproven "examples" of allegedly protected conduct covered by statute "fall short of the requisite substantiality showing").[7] Thus, Anderson has failed to demonstrate that Section 653w is substantially overbroad, and his constitutional claims fail.

CONCLUSION

Accordingly, IT IS THEREFORE RECOMMENDED that the Court DENY Anderson's petition for a writ of habeas corpus with prejudice.

DATED: This 3rd day of September 1992.

JOSEPH REICHMAN
United States Magistrate Judge

[7] This Report and Recommendation finds only that "the statute is not overbroad and therefore is constitutional on its face." *Shackelford v. Shirley*, 948 F.2d at 940-41n.4. Nothing in this report "forecloses a constitutional challenge to a prosecution for speech which is constitutionally protected." Id.

APPENDIX D

People, Respondent v. Cletus Robert Anderson, Appellant

People v. Anderson
No. S024020

SUPREME COURT OF CALIFORNIA

1992 Cal. LEXIS 349

January 22, 1992, Decided

PRIOR HISTORY: 2 Dist. B057289. Div. 4

OPINION: Petition for review DENIED.

APPENDIX E

THE PEOPLE, Plaintiff and Respondent, v. CLETUS ROBERT ANDERSON, Defendant and Appellant

PEOPLE v. ANDERSON
No. B057289

Court of Appeals of California, Second Appellate District, Division Four

235 Cal. App. 3d 586; 1991 Cal. App. LEXIS 1223; 286 Cal.Rptr. 734; Copy. L. Rep. (CCH) P26,849; 21 U.S.P.Q.2D (BNA) 1223; 91 Cal. Daily Op. Service 8526; 91 Daily Journal DAR 13093
October 23, 1991
SUBSEQUENT HISTORY: A petition for a rehearing was denied November 8, 1991, and appellant's petition for review by the Supreme Court was denied January 22, 1992.
PRIOR HISTORY: Superior Court of Los Angeles County, No. MA001417, Margaret M. Grignon, Judge.
DISPOSITION: The judgment appealed from (order granting probation) is affirmed.
COUNSEL: John E. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Assistant Attorney General, Linda C. Johnson and Susan D. Martynec, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Cooper, J., * with Woods (A. M.), P. J., and Epstein, J., concurring.
* Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council.

OPINION: Defendant appeals from his conviction of violation

of Penal Code section 653w. The conviction was based on evidence which established that he possessed for sale some 4,500 audiotapes, identified by an expert witness as "pirate recordings." By this appeal, he challenges the constitutionality of the statute, contending that it violates the First Amendment to the United States Constitution, that it is unconstitutionally overbroad, and that it is preempted by federal copyright laws.

By way of demurrer, he had, prior to trial, challenged the constitutionality of Penal Code section 653w on essentially the same grounds raised on this appeal. He waived jury following the unfavorable ruling on his demurrer. This appeal is taken from the order granting him probation on condition he serve 180 days in the county jail.

The Statute

Penal Code section 653w was enacted as part of a comprehensive statutory scheme designed to prevent and punish the misappropriation of recorded music for commercial advantage or private financial gain. (Pen. Code, § 653h.) On the date of appellant's arrest, Penal Code section 653w provided in pertinent part as follows: "(a) A person is guilty of failure to disclose the origin of a recording or audiovisual work when, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, . . . or possesses for these purposes, any recording or audiovisual work, the outside cover box or jacket of which does not clearly and conspicuously disclose the actual true name and[8] address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group." n1

Although other provisions of the "anti-piracy" legislation have been evaluated and upheld by the courts of this state (see, e.g., *Capitol Records, Inc. v. Erickson* (1969) 2 Cal.App.3d 526 [82

[8] Subsequent modifications of this statute have no bearing on the issues presented in this appeal.

Cal.Rptr. 798, 40 A.L.R.3d 553], cert. den. 398 U.S. 960 [26 L.Ed.2d 545, 90 S.Ct. 2176]), the question of the constitutionality of the disclosure requirements of Penal Code section 653w appears to be one of first impression.

First Amendment

Citing *Talley v. California* (1960) 362 U.S. 60 [4 L.Ed.2d 559, 80 S.Ct. 536], appellant contends that the requirement of disclosing the identity of the manufacturers of audiotapes or videotapes, is likely to inhibit speech and is thus violative of the First Amendment.

In *Talley, supra*, the court found invalid a Los Angeles ordinance which provided that: "'No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following: [para.] (a) The person who printed, wrote, compiled, or manufactured the same.'" (362 U.S. at pp. 60-61 [4 L.Ed.2d at p. 561].)

We are persuaded that two significant features of the instant legislation serve to distinguish it from the offending statute in Talley. First, as we shall discuss, the intent and purpose of the statute must be evaluated and weighed against a potential to inhibit speech. (*Canon v. Justice Court* (1964) 61 Cal.2d 446, 451-454 [39 Cal.Rptr. 228, 393 P.2d 428].) Second, the "speech" at issue here is commercial speech, subject to less severe scrutiny than other forms of protected communication. (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 651 [85 L.Ed.2d 652, 672, 105 S.Ct. 2265].)

We begin with a discussion of *Talley v. California, supra*, 362 U.S. 60. The Supreme Court found that the Los Angeles handbill ordinance (which was not limited to handbills deemed obscene or offensive to public morals, nor likely to identify those responsible for fraud, false advertising or libel) was so broad as to bar "all handbills under all circumstances anywhere" which are issued anonymously. (*Talley v. California, supra*, 362 U.S.

at p. 64 [4 L.Ed.2d at p. 563].) Of significance is the basis for the decision and the limitations the court itself imposed on the result. At page 65 [4 L.Ed.2d at page 563], the court observed: "We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates v. Little Rock*, 361 U.S. 516 [4 L.Ed.2d 480, 80 S.Ct. 412]; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 [2 L.Ed.2d 1488, 1499, 78 S.Ct. 1163]. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

However, as the court in *Eisen v. Regents of University of California* (1969) 269 Cal.App.2d 696, 702 [75 Cal.Rptr. 45, 37 A.L.R.3d 1300], observed: "'. . . *Talley* [did not] hold that anonymity is always protected. . . . The court expressly stated that it was not passing on the validity of an ordinance intended to and in fact limited to the accomplishments of valid purposes.'"

Since *Talley*, litigants have frequently challenged "registration" or "identification" type statutes or ordinances, asserting a constitutional "right to anonymity." (See, e.g., *Huntley v. Public Util. Com.* (1968) 69 Cal.2d 67, 75 [69 Cal.Rptr. 605, 442 P.2d 685]; *Eisen v. Regents of University of California*, *supra*, 269 Cal.App.2d 696; *Canon v. Justice Court*, supra, 61 Cal.2d 446.)

Most of the cases which have analyzed statutes compelling the disclosure of information have done so in the context of political speech. While this category of speech may be said to be the most zealously guarded by our constitution, nonetheless narrowly drawn statutes designed to serve a particular public need have been upheld. In *Canon v. Justice Court*, *supra*, 61 Cal.2d 446, the California court analyzed an Elections Code provision which required the identification of the author of all political material "designed to injure or defeat" any candidate. The court

discussed the holding in *Talley* and the purpose of the legislation at issue and observed: "The crucial question, then, is whether the end to be achieved by the disclosure requirement justifies the resulting impairment of freedom of expression. Certainly, not every infringement upon freedom of speech, of whatever degree and without regard to any countervailing interest, is constitutionally forbidden." (*Id.*, at p. 456.)

Although the statute in Canon was invalidated on other grounds, the court found no improper infringement of the right to free speech. "It is clear that the integrity of elections, essential to the very.preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' [Citation.] It was not the aim of the Legislature to hinder the communication of ideas." (Canon v. Justice Court, supra, 61 Cal.2d at pp. 452-453.)

The state's interest in enacting Penal Code section 653w is the desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of the "piracy and bootlegging" of the industry's products. (Testimony before the Assem. Crim. Law and Pub. Saf. Com., June 1984, Atty. Gen. Analysis, Assem. Bill No. 3619 (1983-1984 Reg. Sess.) Aug. 1984.) The statute is narrowly and specifically drawn to meet that objective.

Although it is certainly conceivable that the statute could, as appellant argues, deter someone from reducing to taped form and distributing his seditious or potentially unpopular views, this outcome is unlikely, inasmuch as the statute applies only to those who possess or distribute such material "for commercial advantage or private financial gain." (Pen. Code, § 653w.) A truly zealous and committed proselytizer may distribute his or her anonymous views, reproduced in any form, free of charge and free from the restraints imposed by this statute.

California has a compelling interest in protecting the public from being victimized by false and deceptive commercial

practices. (See, e.g., *People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 190-191 [157 Cal.Rptr. 628].) "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808 [94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513].) [**10]

The second infirmity in appellant's constitutional challenge lies in the fact that the statute proscribes only "commercial speech." "Thus, we are not confronted with the difficult task of drawing a distinction between 'talk for profit, and talk for other purposes' or of determining the degree of First Amendment protection which should be accorded speech embodying both qualities. [Citation.]" (*People v. Superior Court (Olson)*, supra, 96 Cal.App.3d at p. 191.)

Although we have concluded that a compelling state interest justifies the legislation at bar, where commercial speech is affected, the state need only show a reasonable relationship between the statute and the state's interest in preventing deception of consumers. (*Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. at p. 651 [85 L.Ed.2d at p. 673].) In *Zauderer*, the court examined a state statute which required that any advertising by an attorney contain certain disclosures about the terms under which the attorney's services would be available. The court's explication of the constitutional considerations is equally applicable in this case: "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [citation], appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.' [Citations.]" (Id., at p. 651 [85 L.Ed.2d at p. 672], italics in original.)

In resolving the constitutional challenge in *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at page 652, footnote 14 [85 L.Ed.2d at page 673], the court concluded: "The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."

We find no constitutional infirmity in Penal Code section 653w, which requires conspicuous disclosure of the name and address of the manufacturer of any audiotape or videotape offered or possessed for purposes of sale.

Overbreadth

Appellant asserts that the statute is also unconstitutionally overbroad and cites examples of several apparently legitimate manufacturers of audiotapes and videotapes whose identification does not appear on the box or jacket containing the work. At the hearing on the demurrer, numerous exhibits were introduced to demonstrate this contention; copies of those exhibits are part of the record on appeal and do demonstrate that many commercial recordings available at retail stores do not comply with the requirements of section 653w. Appellant paints graphic word pictures by which we can envision innocent cashiers at retail record outlets being hauled off to jail for selling unidentified tapes teaching conversational German.

Although the argument is interesting, appellant does not have standing to raise it. Traditionally, one to whom a statute may constitutionally be applied cannot challenge that statute on the ground it may conceivably be applied unconstitutionally to others in situations not before the court. (*New York v. Ferber* (1982) 458 U.S. 747, 757 [73 L.Ed.2d 1113, 1123, 102 S.Ct. 3348].) Although the overbreadth doctrine is a recognized exception to this rule, that exception does not apply to commercial speech. (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 481 [106 L.Ed.2d 388, 404, 109 S.Ct. 3028]; *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 496-497 [71 L.Ed.2d 362, 370-371, 102 S.Ct. 1186]; *Bates v.*

State Bar of Arizona (1977) 433 U.S. 350, 380-381 [53 L.Ed.2d 810, 833-834, 97 S.Ct. 2691].)

As the Supreme Court explained in *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. 469, "commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators. [Citations.]" (Id., at p. 481 [106 L.Ed.2d at p. 404].)

Appellant does not have standing to raise the issue of the statute's alleged overbreadth, and we therefore do not reach it.

Federal Preemption

Finally, appellant contends that the statute is void because it is preempted by federal copyright laws. (17 U.S.C., §§ 101 and 409.) This contention is without merit.

In *Goldstein v. California* (1973) 412 U.S. 546 [37 L.Ed.2d 163, 93 S.Ct. 2303], two defendants were charged with misdemeanor violations of Penal Code section 653h, a statute making it a criminal offense to "pirate" recordings produced by others. On appeal from their convictions, they contended that by protecting the rights of artists and performers in their recordings, the state was in essence providing copyright protection, in conflict with federal copyright laws. The United States Supreme Court rejected even their foundational argument that federal law prevents the states from exercising the power to enact copyright statutes. (*Goldstein v. California, supra*, 412 U.S. at p. 553 [37 L.Ed.2d at p. 172].) The court further evaluated the subject statute, its purposes and effects, and found no constitutional violation. At page 571 [37 L.Ed.2d at page 182], the Goldstein court concluded: "The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to

record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording. [para.] In sum, we have shown that section 653h does not conflict with the federal copyright statute enacted by Congress in 1909 [or with the copyright statute passed in 1971]."

Appellant's arguments here are equally unavailing. We see no significant distinction between the purpose and effect of the disclosure requirements of Penal Code section 653w and the unlawful-duplication prohibition of Penal Code section 653h, as they impact on federal copyright laws.

The judgment appealed from (order granting probation) is affirmed.